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No. 103

In the Supreme Court of the United States

OCTOBER TERM, 1936

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

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At the conclusion of the argument of this case, November 18, 1936, permission was granted petitioner to file a brief in reply to the points raised in the respondent's brief. These matters were not raised in the petition and objections to the granting of the writ were not filed by the respondent.

I

NO APPEAL FROM THE POLICE COURT TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA HAS EXISTED SINCE 1891

In respondent's brief, at page 8, it was said that in 1925 a right of appeal from the Police Court to the Supreme Court was withdrawn. We submit

this statement is in error. Under the Act of June 17, 1870 (16 Stat. 153), trials were had in the Police Court without a jury, but the defendant was given a right of appeal to the Supreme Court of the District of Columbia, where the case was tried *de novo* before a jury. The Act of March 3, 1891 (26 Stat. 848) accorded a trial by jury in the Police Court where the defendant, by force of the Constitution of the United States, would be entitled to a trial by jury, or where the fine or penalty might be $50 or more or imprisonment for thirty days or more, the only review of the judgment of the Police Court being by writ of error from the Supreme Court of the District of Columbia. By the Act of Congress approved March 2, 1897 (29 Stat. 607), which created the Court of Appeals of the District of Columbia, the review by writ of error was transferred from the Supreme Court of the District to the Court of Appeals. There is nothing in the Act approved March 3, 1925 (43 Stat. 1119), which deals with appeals or writs of error from the Police Court.

II

THE TRIAL OF CASES INVOLVING VIOLATIONS OF THE LICENSE LAW WERE REQUIRED TO BE BY JURY UNDER THE ACT OF MARCH 3, 1891, THE PREDECESSOR OF THE ACT APPROVED MARCH 3, 1925

As pointed out at page 6 of respondent's brief, in the case of *Lasley* v. *District of Columbia,* 14 App. 407 (1899), the trial involving a violation of a License Act was by jury. This, however, was

required under the provisions of the Act of March 3, 1891, which, in effect, prescribed trial by jury in cases where the penalty was $50 or more or thirty days or more. The maximum penalty prescribed in the Act involved in the *Lasley case* carried a penalty of $50 or thirty days.

III

THE RECORD IS SUFFICIENT TO SUSTAIN A JUDGMENT THAT THE RESPONDENT WAS ENGAGED IN THE BUSINESS OF A DEALER IN SECONDHAND PERSONAL PROPERTY

Paragraph 39, Section 7 of the Act approved July 1, 1932 (47 Stat. 550), defines a "secondhand dealer" as follows:

> Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer.

The evidence in this case shows that on Sunday, March 24, 1935, the witness Baxier, an investigator for the Railway Inspection Company, purchased from the defendant the return portion of a railroad excursion ticket to New York City for which he paid her $1.50. He testified that the defendant approached him at Union Station and asked him to buy the ticket. The witness also stated that the defendant took the $1.50 from his hands. He testified that he was instructed to purchase a ticket

from the defendant at Union Station or anywhere else in Washington, D. C. (Rec. 8).

The witness Evelyn R. Simmons, also an investigator for the Railway Inspection Company, testified on behalf of the prosecution that on Sunday, the 7th day of April 1935, she, in company with her husband, Earl R. Simmons, approached the defendant at Union Station and bought from her the return portions of two railroad excursion tickets to New York City for which she paid the defendant $3.00. She further testified that the defendant stated to her that she, the defendant, expected some friends to arrive on the excursion train from New York from whom she could get tickets. The witness also stated that on Sunday, the 28th day of April 1935, she approached the defendant at Union Station, asked for four tickets but was able to purchase only one ticket from her for which she paid $1.50. The witness further testified that whether or not the defendant was at the station she intended to make a purchase of tickets (Rec. p. 9).

The witness Earl R. Simmons corroborated, in substance, the testimony of Evelyn R. Simmons, and testified that defendant stated, on April 7, 1935, that if he would wait until the excursion train arrived he could get a ticket to New York City as she expected several friends on the train. The witness also testified that he intended to purchase tickets from the defendant when he came to Washington whether or not she was at Union Station (Rec. p. 10).

The witness Walter H. Axline, a Lieutenant of the Police for the Baltimore and Ohio Railroad Company testified that on the 28th day of April 1935 he was present at Union Station when tickets were purchased from the defendant by Mr. and Mrs. E. R. Simmons. The witness further testified that the defendant was pointed out to him by Mrs. Simmons (Rec. p. 10).

The witness, Leaburger, a Lieutenant of Police for the Baltimore and Ohio Railroad Company, testified that on the 28th day of April 1935 he was introduced to the defendant by Mrs. Evelyn Simmons and asked her for a ticket to New York. The defendant replied that she did not have any tickets but she would phone someone to see if she could get tickets. He did not purchase a ticket from the defendant on this date (Rec., p. 11).

Testimony adduced on behalf of the defendant was calculated to establish an alibi. The defendant did not testify.

At the close of the Government testimony defendant moved for a directed verdict on the ground that the six purchases alleged to have been made did not constitute a violation of the License Act. Testimony was given in behalf of the defendant to the effect that on Sunday, the 12th day of May 1935, the defendant had come to Washington in response to a request of a gentleman who was confined in a hospital to take him to his home in Bloomfield, New Jersey (Rec. 15). This gentle-

man did not appear as a witness in behalf of defendant and no explanation of his absence was made to the Court.

The defendant exhibited to the witness L. Johnston, a member of the Metropolitan Police Department, summoned by her, six tickets (R. 15) which had been offered in evidence by the Government in support of the charge for the purpose of determining whether he had come in "contact with any of those unused portions * * * among second-hand dealers or pawnbrokers." He testified that he had not (Rec. 16).

Unquestionably, this series of Sunday sales of railroad tickets, together with the statements alleged to have been made by the defendant to the purchasers, indicated to the trial Court the fruition of a design and intention on the part of defendant to engage in the business of selling the unused or return portions of railroad excursion tickets. The Court, obviously and properly, did not believe the testimony offered by the defendant to prove an alibi. Every sale took place on Sunday in Union Station, the most logical place for the transaction of such business. And it is a matter of common knowledge that such excursions are usually operated on Sunday. It is to be noted also that, according to the testimony of witnesses, when the defendant had no tickets she obligingly offered to obtain tickets for sale to them. It is not known whether defendant earns her livelihood from this source alone, but there is no testimony in the record that

the defendant is engaged in any other business or profession.

In the case of *Harris* v. *State*, 50 Ala. 127, 130, the Court observed:

> "Engage or carry on business", as used in Revenue Law, par. 105, declaring it unlawful for any person to engage in or carry on any business for which a license is required, without first obtaining and paying for such license, signifies that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, and it is not necessary that it should be the sole, exclusive business or occupation; and while the doing of a single act pertaining to a particular business will not be considered as engaging in or carrying on a business, yet, a series of such acts would be so considered.

In the case of *Fox* v. *Smith*, 108 N. Y. S. 181, 182; 123 App. Div. 369, the Court held that one engagement to watch the movements of a husband and report to the wife for a fee was sufficient to sustain a charge against the defendant of engaging in the business of a private detective for hire, although he was not regularly engaged in the business.

Here the defendant did not deny the offense, although witnesses testified in her behalf to establish an alibi. It is submitted that the acts of the defendant were clearly within the prohibition of the License Statute and that the evidence was sufficient upon which to base a conviction of engaging in the business of a secondhand dealer without a license.

IV

THE RESPONDENT'S RIGHTS ON CROSS-EXAMINATION OF THE PROSECUTING WITNESSES WERE NOT PREJUDICIALLY CURTAILED

Even a casual reading of the cross examination of the Government witnesses attempted by the defendant and precluded by the Court shows clearly that the questions were frivolous, immaterial, and irrelevant. One or two instances will serve to illustrate the truth of this statement. Whether the witness Baxier "wanted the Court to believe that the defendant, a white person, approached the witness and asked him to buy a ticket, when there were at least three thousand people in the station", was wholly immaterial. He had already so testified under oath on direct examination, and obviously expected the Court to believe his testimony. There was no material objective in inquiring whether the witness knew defendant was about to sue the Pennsylvania Railroad or whether the officers of the Railroad had unsuccessfully attempted to settle with the defendant. Counsel for the defendant relies upon the decision in *Alford* v. *United States,* 282 U. S. 687. The facts in the *Alford* case are not remotely similar to the present. The Court, however, laid down the broad fundamental rule, peculiarly applicable here, that:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial

court. It may exercise a reasonable judgment in determining when the subject is exhausted. *Storm* v. *United States,* 94 U. S. 76, 85; *Rea* v. *Missouri,* 17 Wall. 532, 542–543; *Blitz* v. *United States,* 153 U. S. 308, 312.

The record (pp. 8–18) shows that practically all of the information desired by the respondent on cross-examination was, during the course of the trial, brought out in the testimony of the various witnesses. Furthermore, an examination of the whole record discloses that the respondent was given a fair trial.

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